INDEX

	Page
OPINION OF THE FLORIDA COURT	2
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	4
ARGUMENT	6
CONCLUSION	18
CERTIFICATE OF SERVICE	19

APPENDIX

Final Order of Discharge entered by Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida	A. 1
Opinion of the District Court of Appeal of Florida, Third District	A. 4

TABLE OF CASES CITED

	Page
Dinnen v. State, Fla., 168 So.2d 703	13
Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 977	16
Grobans Petition, In re, 352 U. S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376	12
Phyle v. Duffy, 334 U. S. 341, 92 L. Ed. 1494, 68 S. Ct. 1131	3
Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344	15
State v. Grayson, Fla., 55 So.2d 554	12
State v. Newell, Fla., 102 So.2d 615	11

FLORIDA STATUTES

Section 27.04	6
Section 932.29	3, 10, 12, 15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 312

STATE OF FLORIDA, ex rel., CLYDE R. HUSK,
Petitioner,

vs.

T. A. BUCHANAN, as Metropolitan Sheriff
of Dade County, Florida,
Respondent.

Respondent's Brief In Opposition To Petition For Writ of Certiorari To The District Court of Appeal Third District, State of Florida.

The Respondent, by and through his undersigned attorneys, and pursuant to Rule 24, Revised Rules of The Supreme Court of the United States, files this his brief opposing the petition for a writ of certiorari filed June 29, 1965 in the above-styled cause. The Respondent was the appellant and the Petitioner the appellee in the District Court of Appeal of Florida, Third District.

The letters (A.) refer to the appendix and (Tr.) to the transcript of record. All emphasis supplied.

For explanation and the convenience of this Court, the Respondent has appended hereto the final order of discharge entered by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (A. 1); and the opinion of the District Court of Appeal of Florida, Third District (A. 4).

OPINION OF THE FLORIDA CCURT

The petition seeks to review the opinion of the District Court of Appeal of Florida, Third District, dated the 25th day of August, 1964, reported at 167 So.2d 38, annexed hereto, (A. 4), reversing the final order of discharge of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, wherein the Circuit Court discharged the petitioner in a habeas corpus proceeding (A. 1).

JURISDICTION

The Respondent moves this Court to dismiss the petition for certiorari heretofore filed in this cause on the grounds that Petitioner is seeking a premature determination of whether he is entitled to immunity from prosecution because his constitutional rights have been violated. In support of this contention, Respondent relies on the following statement of the District Court of Appeal of Florida, Third District, in the opinion in question:

> "Turning now to the second question, relating to the ruling of the circuit court on the immunity, he hold that it was error for the circuit court to discharge Husk on that ground. This is so because the circuit court was without jurisdiction, as the appropriate remedy at that stage

> of the case in the criminal court of record would be to challenge the jurisdiction of the latter court to proceed by claiming immunity, and then, if that court proceeded, to seek relief by writ of prohibition in the appropriate court, this is, in the court having appellate jurisdiction of the criminal court of record. Where a case is pending in the criminal court against a person claiming immunity (such as under Sec. 932.29, Fla. Stat., F.S.A.) it would be the duty of the criminal court involved to give effect to such immunity if it existed. Should the criminal court in such a case refuse to recognize the immunity the further action of that court in prosecuting the cause would amount to an excess of jurisdiction which then would be subject to restraint by prohibition. State ex rel. Reynolds v. Newell, Fla. 1958, 102 So.2d 613, 615; State ex rel. Byer v. Willard, Fla. 1951, 54 So. 2d 179; State ex rel. Marshall v. Petteway, 121 Fla. 822, 164 So. 872." (167 So.2d at P. 40; A. 8)

Before pursuing his proper remedy as outlined for him by the said District Court, Petitioner is asking this Court to resolve the immunity question. In doing so, it is submitted that Petitioner has overlooked the opinion of this Court in the case of *Phyle v. Duffy*, 334 U. S. 431, 92 L. Ed. 1494, 68 S. Ct. 1131, wherein this Court ruled that certiorari does not lie to determine whether state procedure deprives one of due process if the petitioner has not invoked the proper state remedy to have such matter determined.

Since the Petitioner has failed to properly present

the question of his immunity from prosecution in the appropriate tribunals of the State of Florida, it is respectfully submitted that there is no federal question which is ripe for decision here, and therefore, the petition should be dismissed for lack of jurisdiction.

QUESTION PRESENTED FOR REVIEW

WHERE A WITNESS VOLUNTARILY APPEARS BEFORE AN ASSISTANT STATE ATTORNEY CONDUCTING A BRIBERY INVESTIGATION, AND WHERE SAID WITNESS GIVES TESTIMONY RELATING TO THE BRIBERY CHARGE AFTER SAID WITNESS EXECUTES A WRITTEN WAIVER OF IMMUNITY, IS THE SAID WITNESS THEREBY IMMUNIZED FROM PROSECUTION FOR THE MATTERS TESTIFIED TO BY THE SAID WITNESS.

STATEMENT OF THE CASE

On March 29, 1963, the petitioner was telephoned and asked to go to the office of Assistant State Attorney Arthur Huttoe. Prior to taking any testimony, Mr. Huttoe advised the petitioner that he was investigating a bribery charge involving the petitioner in his official capacity as Metro Traffic Engineer of Dade County, Florida (Tr. 15). Mr. Huttoe then read and gave to the petitioner a written waiver of immunity (Tr. 15-16). After being fully apprised of its contents, the petitioner executed the said waiver of immunity (Tr. 16-17), and gave testimony relating to the bribery charge. While the petitioner was being questioned, one Peter J. Maimone, who

was allegedly involved in the bribery charge, was brought into the room and was interrogated by Mr. Huttoe in the presence of the petitioner (Tr. 64-104).

On May 2, 1963, the petitioner was charged by Information with the crime of "Accepting a Bribe" (Tr. 11-13).

On October 17, 1963, the petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, alleging that the petitioner was unlawfully imprisoned under a capias issued on an Information for "Accepting a Bribe" which did not charge an offense. The petition also alleged that the petitioner had been granted immunity from prosecution by the State Attorney by reason of the fact that the petitioner had been forced to give testimony to an Assistant State Attorney during the latter's investigation of the bribery charge (Tr. 1-5). A copy of the said testimony was attached to the petition and made a part thereof (Tr. 15-104).

On October 18, 1963, the said Circuit Court entered its Final Order discharging the petitioner from custody (Tr. 108-110, A. 1).

The District Court of Appeal of Florida, Third District, reversed the Circuit Court, and in an opinion filed August 25, 1964, ruled that (1) the circuit court erred in holding that the information in question failed to state a crime; (2) the circuit court erred in discharging petitioner on the grounds that he had been granted immunity from prosecution, for the proper remedy at that stage of the case in the criminal court of record would be to

challenge the jurisdiction of that court to proceed by claiming immunity, and then, if that court proceeded, to seek relief by writ of prohibition in the appropriate court and (3) the immunity claimed by petitioner was waived by his plea of not guilty (Tr. 156, A. 7-9).

A petition for certiorari filed in the Supreme Court of Florida was denied on March 3, 1965 (Tr. 174).

ARGUMENT

The petitioner appeared in the State Attorney's Office in response to a telephone call. It was not in response to subpoena issued pursuant to Florida Statutes 27.04.

When he appeared in the office of Assistant State Attorney Arthur Huttoe, the following colloquy took place prior to any testimony being given by the petitioner:

> "MR. HUTTOE: Mr. Husk, come on in and have a seat. Sorry to keep you waiting.
>
> My name is Arthur Huttoe and I called you and requested you to come down here. I am Assistant State Attorney and I want to question you in regards to certain things that I have read in the newspaper more in particular with reference to certain placing of traffic lights.
>
> This investigation also will involve possible pay-off of money to any public officials. It could involve bribery, larceny and things of that nature and it is in regard to a department of

yours in which you are the Metro Traffic Engineer of Metro, Dade County, Florida.

However, prior to taking your statement I want to warn you of certain rights and I would like to read to you what is known as a waiver of immunity.

'Waiver of immunity by a witness appearing at the request of the State Attorney of the 11th Judicial Circuit of Florida, in and for Dade County.'

Instead of the State Attorney, I am an Assistant State Attorney. You are appearing before me at my request.

There is a space for your name. 'having been requested by the State Attorney' — in this case Assistant State Attorney — '11th Judicial Circuit of Florida, in and for Dade County, to come before him and testify in a certain matter pending before him, do hereby waive any constitutional rights that I may have touching my immunity from prosecution in such matter.

'I am appearing freely and voluntarily of my own will and accord, and I am thoroughly and completely conscious of all my rights to immunity under the constitution and laws of this State, and for the privilege of making this statement, waive all such rights to any immunity whatsoever.

'I further agree that anything I may say before the aforesaid State Attorney' — in this case Assistant State Attorney — 'may be used against me, as the case may be.'

I will hand it to you and ask you to read it and tell me after you have read it whether or not you understand it.

MR. HUSK: (Reading waiver of immunity) Is this the proper thing to do?

MR. HUTTOE: I cannot tell you what the proper thing to do is: Do you understand it?

MR. HUSK: Yes, sir, I understand what a waiver of immunity is. I don't understand what this is all about.

MR. HUTTOE: It's an investigation into — I think there has been some accusations made of possible pay-offs, briberies and things like that.

MR. HUSK: Yes.

MR. HUTTOE: And that is what I am investigating to determine whether or not there has been any pay-offs or any wrongdoing by any public official or anyone else.

Do you understand that?

MR. HUSK: Yes.

MR. HUTTOE: You have read the waiver and you are voluntarily signing it?

MR. HUSK: Yes.

MR. HUTTOE: You understand it?

MR. HUSK: Yes.

MR. HUTTOE: Would you fill in the whole thing, sir, at the very beginning at the top and the date?

MR. HUSK: (Complying).

MR. HUTTOE: Today's date is the 29th of March.

MR. HUSK: I wonder if I shouldn't have a lawyer before I start signing something I am not exactly sure of?

MR. HUTTOE: Well, I don't want you signing anything unless you are definitely sure of it.

It means anything and everything that you say can be used in any court proceeding whatsoever. If you have violated any laws it can be used against you, that you are waiving immunity and anything you say can and may be used against you at any future proceeding.

Do you understand?

MR. HUSK: Yes, I understand it, I think. Now, what's this all about?

MR. HUTTOE: Now, you want to testify? You are ready to testify?

MR. HUSK: Testify to what?

MR. HUTTOE: All right. I will swear you."

(Tr. 15-18).

The foregoing portions of the record clearly show that prior to giving any testimony the petitioner was advised that he did not have to testify, that the petitioner voluntarily executed a written waiver of immunity, that the petitioner was not compelled or coerced to testify, and that the State Attorney did not make any offer of immunity in return for petitioner's testimony. In view of these facts, it is submitted that the petitioner was not granted immunity under the provisions of Florida Statutes 932.29. The statute in question reads as follows:

"932.29 — No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, burglary, larceny, gaming or gambling, or of any of the statutes against the illegal sale of spirituous, vinous or malt liquores, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to

> subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

The appellate courts of Florida have often ruled that where a witness waives immunity and testifies before a grand jury or a prosecutor, the said witness cannot thereafter avail himself of the provisions of Florida Statutes 932.29. For example, in the case of *State v. Newell*, Fla., 102 So.2d 615, the defendant claimed to be immune from prosecution for bribery because he had testified before the county solicitor and the grand jury concerning facts relating to the charge. His contention was rejected by the Supreme Court of Florida as follows:

> "Relator's appearance before the grand jury on October 18, 1955, was clearly voluntary, there being no contrary contention. He was advised of his rights beforehand and told that he did not have to testify. In volunteering to testify, he waived immunity. State ex rel Hemmine v. Coleman, 137 Fla. 80, 187 So. 792; McKown v. State, Fla. 1951, 54 So.2d 54; State v. Grayson, Fla. 1951, 55 So.2d 554. The proceedings had at the first appearance before the solicitor on May 9, 1955, have been examined and show that relator was under oath and that he waived immunity. His rights were explained to him and it is shown that his appearance before the solicitor was voluntary."

In addition to the fact that petitioner waived immunity in the case at bar, it is also important to note that petitioner was not compelled or coerced in any way to give testimony. This fact is particularly pertinent in view of the following statement of the Supreme Court of Florida in the case of *State v. Grayson*, Fla., 55 So.2d 554, 556:

> "Section 932.29 in terms provides that no person shall be excused from testifying upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime. *In order to immunize him from prosecution there must be compulsion, coercion or an offer of immunity in return for his testimony.*" (Italics supplied.)

The Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in ruling on the immunity question was obviously influenced by the fact that the petitioner was not represented by counsel during his meeting with the Assistant State Attorney, for the court made the following specific reference to this fact in its Final Order of Discharge:

> "It is apparent that Mr. Husk desired counsel and the Court is of the opinion that immunity has been granted to the petitioner by the State." (Tr. 109)

In answer to this ruling, respondent submits that the petitioner was not entitled to be represented by counsel during his interrogation because no charges had been filed against the petitioner at that time. This contention is supported by the case of *In re Groban's Petition*, 352 U. S.

330, 77 S. Ct. 510, 1 L. Ed. 2d 376, in which this Court said:

> "A witness before a grand jury cannot insist as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies . . . . . Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination . . . . This is a privilege available in investigations as well as prosecutions."

The reasoning in the *Groban* case, supra, was followed in a recent decision of the District Court of Appeal of Florida, Second District, in the case of *Dinnen v. State*, Fla., 168 So.2d 703. In that case, the appellant, who had been subpoenaed to appear before the prosecuting attorney, contended that the omission of information as to the nature of the inquiry for which he was summoned and the denial of the aid and benefit of counsel during the inquiry constituted denial of "due process" under the State and Federal Constitutions. In rejecting this contention, the Court said:

> "With respect to the appellant's demand that his attorney attend the inquiry and the contention that such presence is a constitutional right, appellant fails to cite a single authority to support his position. His argument is unpersuasive. While the presence of counsel at inquiries of this

> sort is not unprecented, see Lewis v. State, Fla. App. 1963, 155 So.2d 841, it is not a matter of constitutional right under the Federal Constitution, Re Grobans, 1957, 352 U. S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376, nor, for reasons similar to those discussed in the Grobans case, under the Declaration of Rights of the State Constitution . . . . To the contrary, investigatory interrogation without the presence of counsel has long been recognized and required in Grand Jury proceedings, see Fla. Stat. 905.17, 1963, F.S.A., and is at least permissive in the analagous investigations by public prosecutors."

Although the Constitution gives an accused the right to counsel there is nothing in either the Constitution, statutes, or common law which even remotely suggests that a witness has a right to counsel while testifying before an investigatory body. Permitting witnesses before the state attorney to bring their attorneys with them would in many instances impede and hamper the interrogation of such witnesses. If a witness wishes to claim his right against self-incrimination, he may do so without the aid of counsel. The petitioner in the case at bar failed to claim such right.

The record shows that the petitioner, prior to testifying, was advised that the state attorney was investigating an alleged bribe involving the petitioner. He was advised that if he testified he would have to do so freely and voluntarily, and he thereupon executed a written waiver of immunity. What took place in the State Attorney's office takes place frequently during the investigation of alleged crimes. No one threatened the petitioner

or forced him to testify, and no one offered him immunity in return for his testimony. It is submitted that these facts are far from sufficient to immunize the petitioner under F. S. 932.29.

It is apparently petitioner's contention that he disclaimed his waiver of immunity during the course of his interrogation (Tr. 71, 72, 95), and that it was improper for the assistant state attorney to interrogate him further after he refused to answer any more questions. This contention was refuted by this Court in the case of *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344. The appellant Rogers had been subpoenaed to appear as a witness before a federal grand jury in an investigation of the Communist Party. She testified that she had been the treasurer of the Communist Party (thus admitting her membership in the Communist Party), and that she had turned over the books and records of the Party to another person but she refused to answer the question as to whom she had delivered the books, for her answer would tend to incriminate her as to a different crime of conspiracy to violate the Smith Act.

This Court ruled as follows:

> "The privilege against self-incrimination, even if claimed at the time the question as to the name of the person to whom petitioner turned over the Party records was asked, would not justify her refusal to answer."

And further:

> "Thus, *if a witness elects to waive his privilege*, as he may doubtless do, since the privilege is for

his protection and not for that of another person *and discloses his criminal connections, he is not permitted to stop but must go on and make a full disclosure.*

"Following this rule federal courts have uniformly held that *where incriminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details.*" (Italics supplied)

In his brief, petitioner relies strongly on the case of *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. However, it is submitted that that decision is not controlling in the case at Bar. In the *Escobedo* case, this Court ruled as follows:

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright*, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

In the case at Bar, the petitioner had not been taken into police custody. He was not subjected to a series of interrogations by the police. He did not request nor was he refused the right to confer with his lawyer—he merely wondered out loud if he shouldn't confer with a lawyer. Prior to his interrogation, he was effectively advised of his constitutional right to remain silent. It is clear, therefore, that the *Escobedo* case is far different from the petitioner's case. Even if we agreed that the *Escobedo* case was controlling, its effect would be to render inadmissible at trial the admissions of the petitioner. It would not render him immune from prosecution for the crime with which he is charged.

CONCLUSION

Based upon the foregoing argument and authorities cited, it is submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

BY N. Joseph Durant, Jr.

EARL FAIRCLOTH
Attorney General
State of Florida
Tallahassee, Florida

HERBERT P. BENN
Assistant Attorney General
Miami, Florida

RICHARD E. GERSTEIN
State Attorney, Eleventh
Judicial Circuit, Dade County
Miami, Florida

N. JOSEPH DURANT, JR.
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, Miami, Florida

ELLEN J. MORPHONIOS
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, Miami, Florida

CERTIFICATE OF SERVICE

I, ELLEN J. MORPHONIOS, Assistant State Attorney, Counsel for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 23, 1965, I served copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal Third District, State of Florida, on the Petitioner by mailing a copy thereof in a duly addressed envelope with postage prepaid to MILTON M. FERRELL, Attorney for Petitioner, 550 Brickell Avenue, Miami, Florida 33131.

Ellen J. Morphonios

ELLEN J. MORPHONIOS
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, Miami, Florida
Counsel for Respondent

ORDER ON MOTION FOR DISCHARGE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA AT LAW

No. HC 2470

STATE OF FLORIDA ex rel.
CLYDE R. HUSK,

Petitioner,

-vs-

T. A. BUCHANAN, as Metropolitan Sheriff of Dade County, Florida,

Respondent.

This cause coming on to be heard upon motion of the petitioner that he be discharged and the Metropolitan Sheriff having produced the petitioner before this Court and the Court having examined the information against the petitioner in the Criminal Court of Record, in and for Dade County, Florida, entitled "Accepting a Bribe" and it appearing that the first indictment and information filed on April 12, 1963, entitled "Bribery" was quashed and it appearing to the Court from said information entitled "Accepting a Bribe" that the State in effect alleges that PETER J. MAIMONE and CLYDE R. HUSK entered into an agreement whereby MAIMONE would solicit a bribe from the operator of the Cross-Way Airport Inn in the sum of $1,000.00 and divide the same between the two and alleging further that said $1,000.00 was paid to said MAIMONE under said agreement. It further appears that immunity was granted to PETER J. MAIMONE by the State Attorney, in and for Dade County,

Florida. The Court is of the opinion that from the allegations of said information the State has in effect alleged that MAIMONE and petitioner were principals and that the offense of accepting a bribe was consummated at the time and place MAIMONE solicited or accepted said $1,000.00. The Court is of the further opinion that if the alleged crime of accepting a bribe was committed, it was committed when MAIMONE solicited or accepted said $1,000.00 and not when MAIMONE allegedly paid over $500.00 to petitioner. The Court therefore finds that the above mentioned information for "Accepting a Bribe" filed in the Criminal Court of Record, in and for Dade County, Florida, in the case of STATE OF FLORIDA vs. CLYDE R. HUSK, Case No. G.J. 63-3066, fails to allege a crime against petitioner under the laws of the State of Florida, and the Court is of the further opinion that under the Statute covering the right of the State Attorney to call in witnesses, that the State may only call a witness before the State. It is apparent that MR. HUSK desired counsel and the Court is of the opinion that immunity has been granted to petitioner by the State. The Court is of the further opinion that the State allowed PETER J. MAIMONE, whom the State admitted had been previously given immunity, to be present during a great deal of the interrogation of petitioner and that he gave testimony at the same time confronting the petitioner. The Court is of the opinion that petitioner was deprived of his right under Section 12 of the Declaration of Rights of the Florida Constitution and under the Fifth and Fourteenth Amendments of the Constitution of the United States.

It is, therefore,

ORDERED AND ADJUDGED that the motion of petitioner for discharge from custody, aforesaid, is hereby granted and it is,

ORDERED that the respondent or his deputy in charge forthwith discharge petitioner.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 18th day of October, 1963.

PAT CANNON
CIRCUIT JUDGE

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT COURT OF APPEAL

JULY TERM, A. D. 1964

CASE NO. 63-795

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

T. A. BUCHANAN, as Metropolitan Sheriff of Dade County, Florida,

Appellant,

vs.

STATE OF FLORIDA, ex rel.,

CLYDE R. HUSK,

Appellee.

Opinion filed August 25, 1964.

An Appeal from the Circuit Court for Dade County, Pat Cannon, Judge.

Richard E. Gerstein, State Attorney and Joseph Durant, Assistant State Attorney, for appellant.

Milton Ferrell, for appellee.

Before CARROLL, TILLMAN PEARSON and HENDRY, JJ.

CARROLL, Judge.

This is an authorized appeal from a judgment in habeas corpus entered in the circuit court by which a prisoner awaiting trial on the charge of receiving a bribe was discharged.

The relator, the appellee Clyde R. Husk, was a civil engineer employed by Metropolitan Dade County with the title of Traffic Engineer of the Public Works Department of the county, whose duties consisted of traffic planning and installation of traffic control devices.

On May 3, 1963, an information was issued charging Husk with accepting a bribe in violation of § 838.012, Fla. Stat., F.S.A.

The information charged that Husk accepted a $500 bribe from the owner of an inn bordering a highway for a traffic light installation there. As to how the receipt of the bribe came about the information alleged, in substance, that Husk solicited the bribe through one Peter Maimone as a go-between; and that at the instance of and by agreement with Husk, Maimone obtained from the property owner $1,000 which he and Husk divided.

The bribe was alleged to have been solicited and received March 8, 1963 in Dade County. Some time between that date and the issuance of the information in May, Husk was called before an assistant state attorney and interrogated by the latter with reference to the subject matter referred to. At that time Husk signed a written waiver of imunity. Later, after the information was issued, Husk filed a motion to quash in the criminal court of record

where the cause was pending, in which motion it was contended the information failed to allege a crime under the laws of Florida. The motion to quash was denied. Some months later, after having pleaded not guilty and while released on bail awaiting trial, Husk surrendered himself into custody and filed in the circuit court in Dade County a petition in habeas corpus, contending the information did not state a crime and that the criminal court was without jurisdiction to proceed because he had gained immunity from having been interrogated by the state attorney. A writ of habeas corpus was issued, and answered by the state. On hearing thereon Husk was discharged, and this appeal followed.

In granting habeas corpus and discharging Husk, the circuit court ruled that the information did not state a crime under the laws of Florida, and also ruled that Husk was entitled to immunity as a result of his prior interrogation before an assistant state attorney, under § 932.29, Fla.Stat., F.S.A.

In support of the appeal the state argues that the court was in error in concluding that the information did not allege a crime under the laws of the State of Florida, and in concluding that the waiver of immunity given by Husk was not effective to deprive him of immunity for the interrogation.

The scope of inquiry in the circuit court habeas corpus was limited to a determination of the validity of the statute under which Husk was charged and as to whether the allegations of the information wholly failed to state

any offense under the laws of the State of Florida.[1] The circuit court did not go beyond that limited scope in its consideration of the information on habeas corpus, but held that no crime was stated. The reason given by the circuit court for so holding was, in effect, that because the information alleged Husk used a go-between to propose and obtain a bribe, his receipt of the bribe money was not a crime under the laws of Florida. The statement of that proposition supplies its answer. A person who deals for and obtains a bribe through an agent or go-between, may be in violation of a statute against receiving bribes equally as if he dealt directly. It would unduly lengthen this opinion to quote the information here, and to set out in full the Florida Statute against receiving a bribe. The validity of the statute was not assailed, and a reading of the information shows that a crime was charged under that statute. The reason for holding otherwise by the circuit

---

[1]This well established rule has been announced through the years by the Florida Supreme Court. It was early stated in Ex parte Prince, 27 Fla. 196, 9 So. 659,660, as follows: " • • • [W]here an indictment has been found which, although subject to attack and overthrow upon demurrer, contains enough to show that an offense has been committed of which the court has jurisdiction, the party charged cannot be discharged on writ of *habeas corpus,* but will be remitted to the court in which the indictment is pending for such proceedings as the law may warrant • • • The writ cannot be used as a substitute for a demurrer, a motion to quash, a writ of error, or an appeal or *certiorari.* • • • " See In re Robinson, 73 Fla. 1068, 75 So. 604, 606; Hepburn v. Chapman, 109 Fla. 133, 149 So. 196, 198-199; Taylor v. Chapman, 127 Fla. 401, 173 So. 143; State ex rel. Franc v. Henderson, Fla. 1952, 57 So.2d 840, 841; State ex rel. Leonard v. Kelly, Fla. 1957, 92 So.2d 172; Kelly v. State ex rel. Curry, Fla. 1957, 92 So.2d 178; 15 Fla.Jur., Habeas Corpus, § 33.

In conformity with the foregoing it was said: " • • • The power to discharge from custody by writ of habeas corpus is one that should be exercised with extreme caution and only in a clear case and must be exercised in aid of the administration of justice, not to defeat or needlessly embarrass it. • • •" Reffkin v. Mayo, 115 Fla. 214, 155 So. 677, 678. Accord Taylor v. Chapman, supra.

judge on habeas corpus was unsound, and the holding constituted error.[2]

Turning now to the second question, relating to the ruling of the circuit court on the immunity, we hold that it was error for the circuit court to discharge Husk on that ground. This is so because the circuit court was without jurisdiction, as the appropriate remedy at that stage of the case in the criminal court of record would be to challenge the jurisdiction of the latter court to proceed by claiming immunity, and then, if that court proceeded, to seek relief by writ of prohibition in the appropriate court, that is, in the court having appellate jurisdiction of the criminal court of record. Where a case is pending in the criminal court against a person claiming immunity (such as under § 932.29, Fla.Stat., F.S.A.) it would be the duty of the criminal court involved to give effect to such immunity if it existed. Should the criminal court in such a case refuse to recognize the immunity the further action of that court in prosecuting the cause would amount to an excess of jurisdiction which then would be subject to restraint by prohibition. State ex rel. Reynolds v. Newell, Fla.1958, 102 So.2d 613, 615; State ex rel. Byer, Fla.1951, 54 So.2d 179; State ex rel. Marshall v. Petteway, 121 Fla. 822, 164 So. 872.

---

[2]We pretermit ruling on whether the action of the circuit court in habeas corpus amounted to an unauthorized appellate review of the criminal court's holding thereon, because we have concluded that on the basis on which the circuit court ruled on the question of whether the information alleged a crime it was in error. We point out, however, that the offense charged was a felony and within the jurisdiction of the criminal court of record as to which the circuit court did not have appellate jurisdiction, and that a motion to quash the information had been filed, considered and denied in the criminal court of record on the identical ground of failure to state a crime under the laws of Florida.

For the reasons stated, and for the further reason that the immunity claimed is considered waived by a plea of not guilty,[3] we hold the trial court was in error in discharging the petitioner on the ground of immunity.

In the circumstances presented the writ should have been denied and an order of remand entered. Accordingly the judgment appealed from should be and hereby is reversed.

Reversed.

TILLMAN PEARSON, Judge (dissenting).

The circuit judge, in his order discharging the prisoner, grounded his decision, in part, upon the following facts which he found:

> "***** and the Court is of the further opinion that under the Statute covering the right of the State Attorney to call in witnesses, that the State may only call a witness before the State. It is apparent that Mr. Husk desired counsel and the Court is of the opinion that immunity has been granted to the petitioner by the State. The Court is of the further opinion that the State allowed Peter J. Maimone, whom the State admitted had been previously given immunity, to be present during a great deal of the interrogation of petitioner and that he gave testimony at the same time confronting the petitioner. The Court is of the opinion that petitioner was deprived of

[3]See Poppell v. State, 148 Fla. 275, 4 So.2d 331; Bazarte v. State, Fla.App. 1959, 114 So.2d 500.

his right under Sect. 12 of the Declaration of Rights of the Florida Constitution and under the Fifth and Fourteenth Amendments of the Constitution of the United States."

It is because of the facts referred to in this portion of the Circuit Judge's order that I am impelled to dissent to the decision in this case, even though there is much in the majority opinion that is undoubtedly the law and with which I therefore can have no disagreement.

The State Attorney produced a copy of the proceedings in his office and this record is attached to the petition for habeas corpus. I believe that the interrogation of the petitioner, as revealed by the transcript of that interrogation, affords an adequate legal basis for the finding of the Circuit Judge that the petitioner's constitutional rights were violated in that he was required to attend and answer to a criminal charge in an accusitory proceeding at which he was effectively denied the right of counsel and that during said proceeding he was required to give evidence against himself. It affirmatively appears that it was upon the basis of information thus illegally procured that he was then charged with the crime upon which he was held at the time of the habeas corpus hearing.

If this is true, is the remedy only by appeal and not by petition for habeas corpus? In Milton v. Cochran, Fla. 1962, 147 So.2d 137, which was a post conviction habeas corpus proceeding, the defendant complained that a coerced confession had been improperly admitted into evidence. The Supreme Court held that the confession had not been coerced and therefore, the writ was discharged. But the Court did say:

> "The obvious importance of the confession to the conviction obtained against petitioner and the allegations of abuse and of interrogation for long periods of time, coupled with the long delay in taking the petitioner before a magistrate, suggested a possible deprivation of due process so as to warrant our consideration of this matter on habeas corpus."

It appears to me that the findings of the Circuit Judge bring this case exactly under a deprivation of due process so as to warrant his consideration of the matter on habeas corpus. The petitioner urges that he was unconstitutionally interrogated as a part of a plan to secure evidence which would tend to prove him guilty of a crime of which he was already, in all except formality, charged. If we concede that the facts before the circuit judge may have been a basis for his determination that this much was true, the next step is to inquire if the petitioner can lawfully be tried by the court in which he is now charged upon an information resulting from the unconstitutional interrogation.

It has often been held in Florida that habeas corpus will lie to prevent a prosecution upon an unconstitutional statute or ordinance. Quigley v. State, 99 Fla. 933, 127 So. 898, Cason v. Quinby, 60 Fla. 35, 53 So. 741.

It has further been held that the *jurisdiction* of a court to render a judgment depends upon the due observance of the constitutional rights of the accused. Sneed v. Mayo, Fla. 1953, 66 So.2d 865.

Even though it is undoubtedly true that habeas corpus should not be used to interrupt the orderly prosecution of a criminal case, I feel that in this instance the Circuit Court had the jurisdiction to issue the writ and the discretion to do so. It is sound public policy, required as the only effective means of preserving the constitutional guarantees, that a subsequent information charging the commission of a crime concerning which one was unconstitutionally interrogated and based in whole or in part upon such unconstitutional interrogatories is invalid. See full discussion in State v. Sly, S. D. 1934, 257 N. W. 113.

I recognize that there is a substantial procedural question as to whether the petitioner should be required first to move in the trial court to quash the information, or required both to so move and then appeal from his conviction. No purpose would now be served by a discussion of this question because I understand the majority opinion to hold that the Circuit Court was without jurisdiction to entertain the petition for the writ. It is from such holding that I dissent.